86-2021

NO.

in the

Supreme Court

of the

United States

OCTOBER TERM 1987

MARTIN ALONSO GIL-ZAPATA,
Petitioner

vs.

U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW AND IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR CERTIORARI

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305-759-2001
Counsel of Record

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Suite 315
N. Miami Bch., FL 33162
305-652-0538
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I

Whether the lower courts erred by refusing to interpret and apply principles and standards of constitutional law to the relief requested by the Petitioner, denying him equal protection and due process of law, thereby violating his rights under the Fifth Amendment to the United States Constitution.

II

Whether the lower courts erred by refusing to apply Petitioner's suggested Doctrine of Extreme Hardship resulting in the separation of and prejudice to Petitioner and his family, all of whom are United States permanent residents and citizens.

III

Whether the lower courts erred by refusing to exercise any discretion for relief against deportation in favor of the Petitioner by considering the humanitarian factors against deportation and weighing the Petitioner's narcotics conviction against countervailing equities which were in favor of Petitioner.

IV

Whether section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. Section 1251(a)(11) is unconstitutional because the deportation of a lawful permanent resident alien, who has been convicted of a narcotics violation, violates his substantive and procedural due process and equal protection rights and those of his U.S. citizen and permanent resident relatives by denying them a further family relationship.

CERTIFICATE OF INTERESTED PERSONS

I HEREBY CERTIFY that the following is a complete list of all those persons, attorneys, or offices that have an interest in the outcome of this case.

U.S. Department of Justice
U.S. Immigration Court
Executive Office of Immigration Review
Office of the Immigration Judge
Judge Juan Bracete
Miami, Florida

Immigration and Naturalization Service
Trial Attorney's Office
Ronald Sonam, General Attorney
7880 Biscayne Boulevard
Miami, Florida

Board of Immigration Appeals
Executive Office for Immigration Review
David L. Milhollan, Chairman
5203 Leesburg Pike
Falls Church, Virginia 22041

Donald A. Couvillon, Attorney
Robert Kendall Jr., Assistant Director
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
202-272-4390

Circuit Judges, Tjoflat, Hatchett and Clark
United States Court of Appeals
Eleventh Circuit
50 Spring St., S.W.
Atlanta, GA 30303-3147

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

HARVEY N. ZIMMERMAN
COUNSEL OF RECORD FOR
PETITIONER

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The opinion of the Board of Immigration Appeals, Executive Office for Immigration Review is set forth in the Appendix.

The decision of the United States Court of Appeals for the Eleventh Circuit is set forth in the Appendix.

The judgment of the United States Court of Appeals for the Eleventh Circuit is set forth in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit for which review is sought, was entered on March 23, 1987, and this petition is timely filed pursuant to 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1) and Rule 17, Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT FIVE TO THE CONSTITUTION OF THE UNITED STATES

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

8 U.S.C. Section 1251(a)(11)

(a) ANY ALIEN IN THE UNITED STATES SHALL, UPON THE ORDER OF THE ATTORNEY GENERAL, BE DEPORTED WHO—

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act 21 U.S.C. 802);

STATEMENT OF THE CASE

Petitioner, a twenty year old Colombian national, was deported by the Immigration Court of the United States by Order of Judge Juan Bracete, dated July 12, 1985, pursuant to an Order to Show Cause which was issued by the District Director INS New Jersey. At the time of issuance of the Order to Show Cause, Petitioner was a lawful permanent resident alien of the United States. The Order to Show Cause alleged and alien conceded that he plead guilty in a New Jersey Court to possession with intent to distribute a narcotic substance. Deportability was conceded by the alien and the country of designation for deportation is Colombia. Accordingly, after Motion for Relief including voluntary departure was denied, Judge Bracete entered an Order deporting the alien.

At trial, counsel for the alien requested relief under the Doctrine of Extreme Hardship due to the separation of family. Approximately six witnesses were available in the Immigration Court to testify to such matters. The Immigration Judge indicated both in the courtroom and in his chambers that he would not consider such testimony. Counsel thereupon offered a proffer of such testimony and documentary evidence which was to be offered in support thereof; all of which, including the offer of proof and requests for relief were denied by the trial judge.

Likewise, Counsel was prepared to offer legal argument in support of Petitioner's position, including the Immigration Judge's jurisdiction to entertain requests for construction of applicable Immigration Statutes and Regulations under the United States Constitution.

No testimony was permitted by the Immigration Judge, legal argument was likewise cut off, and the Immigration Judge summarily entered his order of deportation on the record. Petitioner timely appealed to the Executive Office for Immigration Review, Board of Immigration Appeals, and on August 13, 1986, the Board affirmed the decision of the Immigration Judge.

Appeal was thereafter made to the United States Court of Appeals for the Eleventh Circuit, Atlanta, Georgia. Jurisdiction in the Court of Appeals was conferred pursuant to 8 U.S.C. Section 1105(a), Judicial Review of Orders of Deportation and Exclusion.

On March 23, 1987, the Court of Appeals dismissed the Petition for Review.

This Petition for Certiorari followed.

ARGUMENT

It is widely held by United States federal courts ruling on Immigration law that an alien subjected to deportation proceedings is entitled to due process of law. *Chlomos v. U.S. Department of Immigration and Naturalization Service,* 516 F.2d 310 (3d Cir. 1975); *Aguiar-Enriquez v. I.N.S.,* 516 F.2d 565 (6th Cir. 1975); *Avila-Murrieta v. I.N.S.,* 762 F.2d 733 (9th Cir. 1985); *Trench v. I.N.S.,* 783 F.2d 181, (10th Cir. 1986); *Polovchak v. Meese,* 774 F.2d 731 (7th Cir. 1985); *Francis v. I.N.S.,* 532 F.2s 268 (2nd Cir. 1976); *Naria-Duran v. I.N.S.,* 568 F.2d 803 (1st Cir. 1977).

This basic and fundamental right of an alien was set out by the U.S. Supreme Court as early as 1903 in *The Japanese Immigrant Case,* 189 U.S. 86, 23 S.Ct. 611, 41 L.E.D. 721 (1903).

In *Bridges v. Wixon,* 326 U.S. 136, 154, 65 S.Ct. 1443, 1452 89 L.Ed. 2103 (1945), the court said:

"We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards for fairness."

The Board of Immigration Appeals has continuously held that it is the duty of the Immigration Court, in hearing a deportation proceeding, to reach a rational judgment based upon the facts presented and thereafter to render its decision. The BIA has repeatedly stated that the exercise of this rationale is to be without prejudice to the Petitioners.

The trial court, in the case at bar, made a ruling of deportation only on the record of proceedings, to wit: the Petitioner was convicted of possession with intent to distribute a narcotic substance and therefore was not entitled to any relief including voluntary departure and was clearly deportable. The trial judge refused to accept any testimony, refused a proffer of testimony and

documents, and cut off legal argument that would permit a rational, unprejudicial application of discretionary relief. Petitioner raised the issue and attempted to argue in the lower courts that this violated his rights of equal protection and due process under the United States Constitution and resulted in prejudice to him and to his permanent resident and United States citizen family in derogation of their Constitutional and Statutory rights.

Humanitarian considerations, where warranted and provided for in the immigration laws, to wit; doctrines relating to the separation of family adopted by the Board of Immigration Appeals, together with the applicable tests and opportunities to meet the burden for relief, as provided by those decisions creating that doctrine, should have been taken into consideration and applied by the lower courts in the case at bar.

The lower courts abused their discretion by failing to consider all of the factors which bear on extreme hardship on application for suspension of deportation. Immigration and Nationality Act, 8 U.S.C. Section 1254(a). See also, *Mejia-Carrillo v. U.S. Immigration and Naturalization Service,* 656 F.2d 520 (9 Cir. 1981), and *Carrette-Michael v. Immigration and Naturalization Service,* 749 F.2d 490 (8 Cir. 1984).

In the instant case, the Petitioner's entire family is in the United States, all in lawful status. If no relief is afforded by this Court, he will be deported to Colombia and indefinitely and perhaps permanently separated from them. The most important single factor in determining personal and emotional hardships which

result from deportation has been said by the Federal Courts to be the separation of the alien from family in the United States. In fact, the courts have said that separation from family *alone* may establish extreme hardship. *Urbano de Malaauan v. INS,* 577 F.2d at 593-94 (9 Cir. 1978) *Bastidas v. INS,* 609 F.2d 101, 104-5 (3d Cir. 1979). *Bastidas* also states: The family and relationships between family members occupies a place of central importance in our nation's history and are a fundamental part of the values which underlie our society. Accordingly, we view the separation of family members from one another as a serious matter requiring close and careful scrutiny. See also, *Moore v. City of East Cleveland,* 431 U.S. 494, (1977).

Cases are legion upon the doctrine of family unification. Indeed, the Immigration Laws as a whole created the doctrine of family unification providing the "preference" system. For instance, even under prior Immigration statutes, it is generally conceded that separation from one's spouse entails substantially more than economic hardship, *Yong v. INS,* 459 F.2d 1004-5, (9th Cir. 1972). In the instant case Petitioner sought to show that he had no close or immediate relatives outside of Miami, Florida, U.S.A., but was denied a hearing upon such a fundamental issue.

The doctrine of prejudicial deportation, together with doctrines disapproving family separation should have been considered by the lower courts in attempting to administer a rational decision. Based on the facts of the particular case in question, Petitioner urges that such matters must be considered because at a minimum they constitute "equities", *Yong supra.*

Due process requires a fair hearing of the non-frivolous issues which are triable because of the significant collateral consequences of deportation, (i.e., ability to re-enter, possible conviction if re-entry is sought, etc.) to the alien, and extreme hardship to both the alien and to his immediate relatives who are United States citizens and permanent resident aliens.

Petitioner was also prepared to argue and show that at the time of the conviction, his status as a youthful offender (defeined as between the ages of 18 and 22) should have been taken into consideration as an equity in his favor. Based on the fact that he was a youthful offender, there is the ability to show complete rehabilitation. Petitioner had no criminal record prior to nor since the arrest which was the basis for the charges and conviction in question. Congress has implied in formulating immigration laws that the public interest in the deportation of narcotics criminals should not override the need for individual clemency in certain cases. To ignore these facts would be to disregard the merits of the individual involved.

Petitioner is not eligible under New Jersey law to expunge his conviction, regardless of his age (NJSA 2C:52-2(c) and 2C:52-5). There is federal case law, however, which points out the injustice in deporting young drug offenders who were eligible for expungement of their criminal records. The cases express concern that youthful offenders should be afforded the opportunity to atone for their youthful indiscretions, if they respond successfully to rehabilitation. The court states: We cannot imagine a more complete deprivation of a second chance than

deportation. *Mestre Morera v. United States Immigration and Naturalization Service,* 462 F.2d 1030 (1st Cir. 1972). In *Rehman v. Immigration and Naturalization Service,* 544 F.2d 71 (2nd Cir. 1976), an alien was allowed to produce a Certificate of Relief from Disabilities (a type of expungement procedure) under New York law whereby the recipient does not suffer automatic forfeiture of any other rights or privileges because of his conviction, in this case deportation. New Jersey law, which has not adopted a comparable expungement statute has effectively prohibited Petitioner from having his record expunged and falling into the same category as these youthful offenders. Petitioner should not be denied the right to show his own youthfulness at the time of his conviction, nor his rehabilitation since, so that he may avoid deportation and be allowed to remain with his American citizen wife and family in the United States.

Petitioner submits that the lower courts in the alleged absence of available waivers of deportability, in particular in a case where a questionable narcotics conviction by a youthful offender exists; should have balanced the countervailing equities of a narcotics offense against the equities which exist in this case.

In order to qualify for a suspension of deportation under 8 U.S.C. Section 1254(a)(1), an alien must prove physical presence in the United States and good moral character over a period of seven (7) years in addition to extreme hardship, whereas, 8 U.S.C. Section 1254(a)(2) requires a showing of proof of ten (10) years of good moral character with physical presence in the United States in addition to exceptional and extremely

unusual hardship to the alien's family, if that person is deportable under 8 U.S.C. Section 1251(a)(11), 8 U.S.C. Section 1254(e) permits an alien to voluntarily depart the United States if he can show good moral character for a period of five (5) years immediately preceding his application, but only if the alien does not fall under the provisions of 8 U.S.C. Section 1251(a)(11).

These laws effectively prohibited Petitioner from showing his ability to prove why he is eligible for a waiver of deportability. There appears to be a gap in the law with respect to aliens in the same position as Petitioner. Multiple narcotics defendants are affected by these laws wherein no relief is available to them. It is a matter of urgent public concern that a decision be made which favors at least some type of discretionary relief to aliens in the same position as Petitioner. Due to the absence of Congressional action it is necessary that the Court decide and rule on these matters.

Federal courts of appeals are deciding these important questions of federal immigration law, and there appears to be conflicting federal opinions in relation to which aliens are deportable depending on what status they are in according to the United States Code and Immigration laws, and which aliens will be allowed to show the equities in their particular case.

There must be some relief afforded to those aliens who do not fall in any of the categories delineated in the laws as they presently stand, and it is within the purview of this Court to review these issues.

The statutory requisites for deportation cases are set out in 8 U.S.C. Section 1252(b), and include the following (3.) Opportunity for the alien to examine the evidence produced, to cross-examine and present evidence in his own behalf, and (4.) a decision of deportability based on reasonable, substantial, and probative evidence.

Petitioner alleges that the United States Government, by deporting him, violated his substantive and procedural due process rights and those of his immediate relatives by denying them a further continuous family relationship. The lower courts refused to hear testimony on these issues, with the trial court concluding that it had no jurisdiction to review constitutional standards or unconstitutional equivalents in construing immigration statutes or laws that deport aliens under its authority.

Congress has provided for judicial review of "final orders of deportation" by the Federal Courts of Appeal, 8 U.S.C. Section 1105(a), and includes: . . . consideration of constitutional infirmities . . . which if well taken, would void the deportation order. *Riva v. Attorney General of the United States,* 377 F.Supp. 1286, 1288 (D.C.C. 1974), *Pilapil v. INS,* 424 F.2nd at 9, and see also, 2 C. Gordon and H. Rosenfield, Immigration Law and Procedure, Section 8.9 Ab (rev. ed. 1981).

Without question, the stakes are considerable for any Petitioner in a deportation case, and it is fundamentally unfair that 8 U.S.C. Section 1251(a)(11) be so strictly construed so as to leave no available relief to an alien who can show that his particular case includes equities which should be considered by our Courts.

The consequences of deportation are often very grave for the individual involved. Deportation may result in loss "of all that makes life worth living." *Ng Fung Ho v. White,* 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, 943 (1922). It can be the equivalent of banishment or exile. *Delgadillo v. Carmichael,* 332 U.S. 388. 391, 68 S.Ct. 10, 12, 92 L.Ed. 17, 19 (1947).

Petitioner was admittedly convicted of a narcotics violation. He was sentenced and served that term as punishment for the offense. Should Petitioner be deported, he would face an additional punishment and sentence, but this time the effect would be permanent and much more severe. Petitioner will be deprived of life and liberty in the country where he has lawfully resided since he was fourteen (14) years old and in which he has chosen to live.

The most devastating result of the deportation of Petitioner is that he is to be separated from his entire family including his American citizen wife. It can hardly be said that equal protection and due process of law has been afforded this Petitioner.

CONCLUSION

It is respectfully submitted that the purpose of the Immigration and Naturalization laws of the United States will best be served when rational decisions by the Immigration Court and the appeals courts are based on a weighing of the equities involved in the particular case and that these equities are considered when rendering decisions.

The equal protection and due process rights of the alien and his family must be preserved. A fair hearing which determines the merits of the individual's case by allowing all relevant testimony, documentary evidence, and legal argument into the record must be considered whereupon the presiding judge may then decide the merits of the case according to the law, principles, and doctrines which govern immigration law under the protection of the guaranteed rights of the United States Constitution. The equities were not considered in this case, nor any evidence or testimony allowed resulting in an injustice to the Petitioner who stands to be prejudicially deported if no relief is afforded him.

Respectfully submitted,

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305-759-2001

Counsel of Record

GAIL A. ROBERTS
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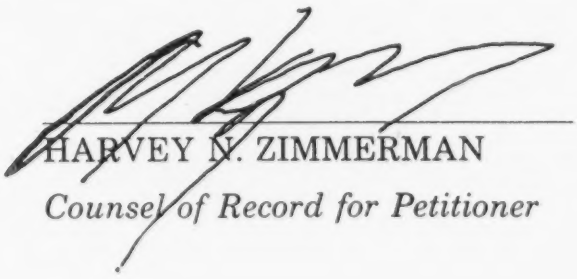
305-652-0538

ATTORNEYS FOR PETITIONER

I HEREBY CERTIFY that the attached Petition for Certiorari is a true and correct copy of the original as filed with the Clerk of the Supreme Court of the United States in compliance with Rule 28 (3) of the Supreme Court Rules, and that the required three (3) copies were sent by United States mail to all of those parties listed in the attached Certificate of Interested Persons, this 16th day of June, 1987.



HARVEY N. ZIMMERMAN
Counsel of Record for Petitioner

Appendix

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Miami, Florida

July 12, 1985

File No.: A36 099 186

IN DEPORTATION PROCEEDINGS

In the Matter of

MARTIN ALONSO GIL-ZAPATA

Respondent

CHARGE: Sec. 241(a)(11) of the I & N Act.

APPLICATION: Termination

ON BEHALF OF RESPONDENT:
Harvey Zimmerman, Esquire

ON BEHALF OF SERVICE:
Ronald Sonom, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native an citizen of Colombia who entered the United States as a lawful permanent resident on June 4, 1980. On August 6, 1984 he was

convicted on a plea of guilty to the charges of possession of a dangerous controlled substance and possession of a dangerous substance with intent to distribute and he has been charged by the Service with deportability under Section 241(a)(11) of the Immigration and Nationality Act. Deportability is established clearly, convincingly and unequivocally by the admissions made by the respondent through counsel in these proceedings. The counsel for the respondent has raised the constitutional argument in that the respondent's deportation would deprive lawful permanent resident and United States citizens of certain rights to be in the companionship of the respondent in these proceedings. This immigration Court has no jurisdiction to pass on the constitutionality of the statutes it administers and therefore it is unable to pass on the constitutional argument raised before it. The respondent is not eligible for relief under Section 212(c) of the Act since the Order to Show Cause was issued on February 28, 1985 and that is less than 7 years since the respondent's admission for lawful permanent residence. The respondent is not eligible for relief under Section 244(a)(1) of the Act in that he is unable to establish good moral character on account of the conviction of August 6, 1984. Likewise, the respondent is not eligible for voluntary departure since that same conviction precludes again a finding of good moral character, a requirement for relief under Section 244(e) of the Act. The respondent has designated Colombia as the place to which he wishes to be deported and that will be the country we shall designate. It is my Order that the

respondent be deported from the United States to Colombia on the charge contained in the Order to Show Cause.

JUAN BRACETE
Immigration Judge

cc: General Attorney
Respondent (attorney's current address unknown)

[AUG 13 1986]

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A36 099 186—Miami

In re: MARTIN ALONSO GIL-ZAPATA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Harvey Zimmerman, Esquire
8101 Biscayne Boulevard, Suite 500
Miami, Florida 33138

ON BEHALF OF SERVICE:
Ronald Sonom
General Attorney

CHARGE:
Order: Sec. 241(a)(11), I&N Act [8 U.S.C. §1251(a)(11)]—
Convicted of narcotics violation

APPLICATION:
Termination

ORDER:

PER CURIAM. The decision of the immigration judge is affirmed for the reasons stated therein. Through

counsel, the respondent conceded deportability (Tr. at 3). No eligibility for relief from deportation under the immigration laws of the United States has been identified. The sole argument advanced by counsel below concerned a challenge to the constitutionality of the laws in question. He was not precluded from introducing any evidence or advancing any argument (Tr. 3-5). Particularly in view of the concession of deportability after a continuance of over seven weeks to prepare this case, we find counsel's arguments both before the immigration judge and on appeal meritless. Accordingly, the appeal is dismissed.

Chairman

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5757
Non-Argument Calendar

MARTIN ALONSO GIL-ZAPATA,

Petitioner,

versus

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
and
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

Petition for Review of an Order
of the Board of Immigration Appeals

(March 23, 1987)

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

Appellant, having been convicted of possession of a dangerous controlled substance and possession of a dangerous controlled substance with intent to distribute, conceded before the immigration judge, and the Board of Immigration Appeals, his deportability under section 241(a)(11) of the Immigration and Nationality Act, 8

U.S.C. §1251(a)(11) (1982). In this appeal, he presents four reasons why he should not be deported. None of his reasons has merit.

AFFIRMED.

United States Court of Appeals
for the Eleventh Circuit

No. 86-5757
Non-Argument Calendar

No. A36-099 186

MARTIN ALONSO GIL-ZAPATA,

Petitioner,

versus

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
and
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

Petition for Review of an Order
of the Board of Immigration Appeals

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Martin Alonso Gil-Zapata for review of an order of the Board of Immigration Appeals, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that upon the petition for review, the order of the Board of Immigration Appeals in this cause be and the same is hereby, AFFIRMED;

It is further ordered that petitioner pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 23, 1987
For the Court: Miguel J. Cortez, Clerk
By: Deputy Clerk

ISSUED AS MANDATE: [APR 20 1987]